



ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL, INC.

1200 19TH STREET, N.W., SUITE 300
WASHINGTON, D.C. 20036-2422
(202) 429-5151
FAX (202) 223-4579

RECEIVED

JAN 6 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

January 6, 1997

Mr. William F. Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Comments, CC Docket No. 96-238

Dear Mr. Caton:

Enclosed please find an original and eleven copies of Comments of the Association of Telemessaging Services International (ATSI) in the proceeding, FCC 96-460, CC Docket No. 96-238. Additional copies have been delivered to Anita Cheng of the Common Carrier Bureau and the International Transcription Services.

Sincerely,

Herta Tucker
Executive Vice President

DOCKET FILE COPY ORIGINAL

cc: International Transcription Services, Inc.
2100 M Street, N.W., Suite 140

Anita Cheng (2 copies plus diskette)
Common Carrier Bureau
2025 M Street, N.W., Room 6008

No. of Copies rec'd
List ABCDE

0+11

RECEIVED

Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 6 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-238
)	
Amendment of Rules Governing)	
Procedures to Be Followed When)	
Formal Complaints Are Filed Against)	
Common Carriers)	

**Comments of the Association of
Telemessaging Services International**

**ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)**

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of Telemessaging Services International
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151

Summary of Comments

In this NPRM, the Commission proposes certain rules for formal complaints that alone will not serve to meet the special requirements of Section 260(b) of the Telecommunications Act of 1996. Certain specialized rules not proposed in this NPRM will be necessary to secure Section 260's goal of providing telemessagers with immediate access to the resolution of disputes. Many of these were acknowledged in an earlier NPRM and the Commission must not fail to include these in any final set of rules for Section 260 Complaints.¹

With respect to this NPRM, general rules made applicable to Section 260 must not create burdens that will delay the filing of a Section 260 Complaint or the resolution of the underlying dispute. While ATSI recognizes the Commission's need to streamline its procedures in order to meet the various deadlines created by the Act, including those of Section 260(b), any attempt to create a set of one-size-fits-all procedures will create inappropriate burdens on complainants eligible to file under Section 260.

¹ See, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services NPRM, FCC 96-310, CC Docket No. 96-152 (released July 18, 1996) ("Section 260 NPRM").

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of the)	
Telecommunications Act of 1996:)	CC Docket No. 96-238
)	
Amendment of Rules Governing)	
Procedures to Be Followed When)	
Formal Complaints Are Filed Against)	
Common Carriers)	

**Comments of the Association of
Telemessaging Services International**

Statement of Interest

ATSI represents Enhanced Service Providers (ESPs) who offer, first and foremost, live, "person-to-person" answering services to the communications customer. ATSI also represents ESPs who offer automated telemessaging services. Telemessagers provide opportunities for call completion for their customers and offer options of voice messaging services, paging activation, as well as order taking and information exchange. Telemessagers address the special, personalized needs of the communications customer by providing value-added services to those services available from the incumbent network owner.

ATSI filed comments in response to the NPRM on Telemessaging, Electronic Publishing, and Alarm Monitoring Services.² In its comments, ATSI emphasized that Section 260(a) creates a prohibition against anticompetitive conduct on the part of network owners and that Section 260(b) creates a specialized procedure through which telemessagers may seek expedited relief from such conduct.

Congress recognized with passage of the Telecommunications Act of 1996 that incumbent network owners have the potential to gain unfair and anticompetitive market advantages that must be prohibited. Section 260(a) creates an absolute prohibition against: 1) the direct or indirect subsidization of any telemessaging operation on the part of a network owner; and 2) preferential or discriminatory treatment on the part of the network owner in favor of its own telemessaging operations.

² See, Comments of the Association of Telemessaging Services International, CC Docket No. 96-152, filed September 4, 1996.

ATSI further argued that Section 260(b) provides a specialized complaint process through which telemessagers may bring to the attention of the Commission: 1) any conduct or practices that violate these prohibitions; or 2) any circumstances that result from such conduct or practices. ATSI argued that the Commission is authorized to provide immediate relief from any violations of prohibited conduct and is further authorized to utilize Section 260(b) to develop additional safeguards against prohibited practices of Section 260(a) as incidences of anticompetitive conduct and patterns of practice are brought to its attention.

Congress purposefully designated Section 260 as a special complaint category, and the Commission must not develop rules that will limit the section's scope or practical applicability. Section 260(b) is intended to provide telemessagers with an efficient and expedient pathway to relief from prohibited conduct and practices. Specifically, the Commission must not develop costly or time consuming rules of procedure or evidence that will undermine the availability of making an immediate appeal to the Commission, or that otherwise limit the ability of telemessagers to file timely complaints. Section 260(b) must be available to telemessagers and their representative organizations, like ATSI, who seek immediate relief from specific practices on a case-by-case basis as well as for relief from patterns of practice engaged in by one or more than one incumbent network owner.

Response to NPRM

Paragraph references in the text of this comment refer to the paragraphs of this NPRM, FCC 96-460, CC Docket No. 96-238.

In General.

ATSI agrees in principle with the Commission's efforts in this NPRM to streamline its formal complaint procedures and to otherwise create efficiencies through the development of standard procedures applicable to all formal complaints; however, certain standard procedures set forth by the Commission in this NPRM will not in and of themselves satisfy the specific requirements on Section 260(b) of the Act.

Section 260(b) creates a special complaint procedure for telemessagers and is intended to foster a pro-competitive environment in this segment of the telecommunications industry. Section 260 requires the Commission to adopt rules for telemessagers that do not prolong the time between recognition of a violation by a telemessenger and resolution of a complaint by the Commission. In adopting rules that will be applicable to Section 260, the Commission must, therefore, address the unique aspects of telemessaging that caused Congress to provide specific relief under Section

260 and the specific requirements of that section.

ATSI is concerned that in attempting to restructure its general procedures for all formal complaints in order to meet the new deadlines of the Act, the Commission will create unnecessarily heavy, unanticipated, an inappropriate pre-filing burdens on complainants that will discourage the filing of legitimate complaints under Section 260. Congress did not intend the expedited complaint procedures required under Section 260 to result in increased burdens. The goal of Section 260 is to provide a readily accessible and immediate pathway towards resolution of disputes without significantly increased costs and dedication of resources on the part of the small businesses that provide telemessaging services. Requirements that delay the filing of a complaint in order to expedite the Commission's ability to respond to a complaint once filed fail to meet the requirements of Section 260.

Nevertheless, ATSI agrees with the Commission's stated goal of this rulemaking to implement requirements that encourage potential parties to resolve their differences prior to adjudication before the Commission. See NPRM ¶ 21. ATSI also agrees with the Commission's stated goal of achieving a full and sufficient record upon which to render decisions within the stated deadlines while not adversely affecting the rights or interests of any party. See NPRM ¶ 22.

NPRM ¶¶ 27 - 29, Pre-filing Procedures and Activities.

The Commission seeks to identify specific pre-filing activities available to potential complainants and defendants that could serve to settle or narrow disputes, or facilitate the compilation and exchange of relevant documentation or other information prior to the filing of a formal complaint with the Commission. See NPRM ¶ 27. ATSI agrees with the Commission's desire to promote any actions that could narrow the scope of issues raised, particularly for those complaints that fall within one or more of the Act's deadlines, which includes Section 260(b).

ATSI supports the Commission's proposal to require a complainant, as part of its complaint, to certify that it discussed, or attempted to discuss, the possibility of a good faith settlement with the defendant prior to filing the complaint as long as the Commission is able to ensure that this requirement not become an opportunity for defendants to delay a legitimate filing. See NPRM ¶ 28. For example, the defendant should not be able to challenge a certification in an attempt to delay a response to conduct prohibited by Section 260(a) and subject to a Section 260 Complaint proceeding.

ATSI has no objection to the Commission's suggestion of using a neutral industry committee to address technical and other business questions raised in a complaint. See NPRM ¶ 29. Any deliberation of such a committee within the context of a Section 260 Complaint proceeding, however, must be kept within the 120-day and 60-day deadlines. For example, such a committee would be called upon for its input only after the complaint had been filed and the 120-day and 60-day resolution deadlines of Section 260 have begun to run.

The Commission also raises the possibility for the use of alternative dispute resolution (ADR) mechanisms. See NPRM ¶ 29. ATSI has suggested in earlier proceedings the use of ADR mechanisms in resolving disputes between requesting ESPs and network owners.³ The Commission should encourage the use of ADR mechanisms as an alternative to the resolution of disputes through the formal complaint process, including Section 260 Complaints; however, the proposal to engage in such a process by a telemessenger should be evidence that a complainant has undertaken all required pre-filing activities to resolve the dispute and it must not be used to create delay in the filing or resolution of Section 260 Complaints.

³ See, Comments of the Association of Telemessaging International, CC Docket No. 96-98, filed May 30, 1996, pages 17-20; See also, Comments of the Association of Telemessaging International, CC Docket No. 96-149, filed August 16, 1996, pages 15 and 16.

NPRM ¶¶ 30 - 35, Service.

The Commission states that its primary goal in proposing changes to the current service procedures is to prevent the delay caused by the requirement that formal complaints be served on defendant carriers. See NPRM ¶ 30. ATSI supports this goal for both formal complaints in general and Section 260 Complaints. Specifically, ATSI supports the Commission's proposals to require a complainant to effect service simultaneously on the defendant carrier, Commission, and the appropriate staff office at the Commission and that all subsequent pleadings be served by overnight delivery or by facsimile. See NPRM ¶¶ 31 - 33, and 35.

The Commission also proposes to require a complainant to submit a completed intake form with any formal complaint as part of the filing requirement to indicate that the complaint meets the various threshold requirements for stating a cause of action under the Act and the Commission's rules. See NPRM ¶ 34. ATSI supports the concept of an intake form; however, the form should serve as a checklist for all applicable threshold requirements for complainants, and should include specific check-off boxes to clearly indicate the specific complaint category utilized. This will allow complainants, defendants and the Commission to readily determine what special standards and deadlines will be applicable in the complaint proceedings.

NPRM ¶¶ 36 -46, Format and Content Requirements.

The Commission states that in proposing its format and content requirements, its goal is to tailor procedures to ensure that complainants and defendants have a full and fair opportunity to present or defend against allegations of misconduct without unnecessary pleadings. See NPRM ¶ 36.

ATSI supports this goal for both formal complaints in general and Section 260 Complaints.

However, to accomplish this goal, the Commission acknowledges that it proposes to place greater burdens on complainants and defendants to provide full legal and factual support at the beginning of the process. ATSI opposes any significant shifting of burdens onto complainants as a way to enable the Commission to meet the time requirements under Section 260(b). By attempting to expedite all formal complaints with a single set of procedural standards, the Commission will be required, as it does in its proposals in this NPRM, to shift burdens contrary to the intent of Section 260.

The Commission proposes a requirement that all parties include full statements of relevant facts, and include in pleadings supporting documentation and affidavits of persons attesting to the accuracy of the facts stated in the pleadings. See NPRM ¶ 37. The Commission also proposes a requirement that a complainant append to its complaint documents and other materials to support the underlying allegations and request for relief stated in the complaint. See NPRM ¶ 39. ATSI

does not object to these proposals to the extent that only such facts, documents and materials that are readily available to the complainant and not in the control of the defendant or other entity are subject to this requirement. The inability of a complainant to provide facts and documentation not available to it should not be grounds of dismissing a complaint or rendering it subject to procedural challenges by defendants. Furthermore, a complaint may identify facts and documentation known to be in the custody of the defendant, and the Commission must require the defendant to attach these to its answer in order to establish the record required to move forward at the outset of the proceedings.

The Commission further asks whether it should permit complaints that rely on assertions based on "information and belief". See NPRM ¶ 38. Again, ATSI supports the goal of requiring a full statement of facts and information known to the complainant at the time of the filing of the complaint; unfortunately, certain information will not be available to complainants, including those who file under Section 260. Ownership of the network and control over the network's bottleneck points prevent telemessagers from having access to vital information that the Commission may require in resolving disputes raised under Section 260. ATSI has pointed out in other proceedings that telemessagers are simply not privy to such information, while telemessagers can show facts or circumstances that could result from behavior prohibited under

Section 260(a).⁴

The Commission also proposes to require a complainant to include a detailed explanation of the “manner in which” a defendant has violated the Act. See NPRM ¶ 40. ATSI likewise has concerns in the requirement that telemessagers be required to have knowledge of the manner in which a defendant has violated Section 260. Section 260(a) prohibits certain conduct that results in discriminatory treatment of telemessagers. A statement of facts and circumstances that could result from such behavior must satisfy all requirements relating to format and content. Requiring a more detailed showing of the manner in which a violation has occurred will create a road block to formal complaints in general and to Section 260 Complaints. The Commission must allow any party to file a complaint even though information is not available that would allow a detailed description of the “manner in which” a violation has occurred known only to the defendant.

To summarize, the Commission must accept Section 260 Complaints that describe facts and circumstances that could result from prohibited behavior. The defendant may in its answer provide an explanation based on permissible behavior. Where the answer does provide information unavailable at the time of the filing, the complainant must have an opportunity to

⁴ See, Comments of the Association of Telemessaging Services International, CC Docket No. 96-152, filed September 4, 1996, page 10.

respond.

The Commission acknowledges that its proposed format and content requirements will require both complainants and defendants to expend more time and resources in the initial phases of the formal complaint proceedings than is the case under current rules. See NPRM ¶ 44. While these increased burdens may well result in the Commission's ability to provide more prompt resolution of complaints once filed, it is imperative that any final rules applicable to Section 260 Complaint not simply result in a trade-off between pre-filing resource and time requirements imposed on the complainant and the post-filing time and resource requirements imposed on the Commission.

With Section 260, Congress imposed a duty on the Commission which now rightly seeks ways to meet. The one-size-fits-all approach taken in this NPRM will in certain circumstances result in rules inappropriate to the specialized requirements of Section 260. As a practical matter, if a telemessenger now faces time delays in the preliminary and pre-filing stage rather than in the post-filing stage, the complainant is deprived of the benefit intended under Section 260.

The Commission proposes, upon a showing of financial hardship or other public interest factors, that the format and content requirements for complaints and answers be waived, and seeks guidance on what standards should be used to determine "good cause" for waiving its proposed

changes. See NPRM ¶ 44. ATSI supports such a waiver within the context of formal complaints in general; however, this alone does not provide the immediate access to resolution of disputes required under Section 260. A Section 260 Complaint process must have rules that will not require a complainant to make special requests for such a waiver. Section 260 is a specialized proceeding and must not be turned into a waiver process under the general rules for formal complaints.

The Commission proposes that pleadings filed solely to effect delay in the prosecution or disposition of a complaint be considered filings for improper purpose within the current meaning of section 1.734 of the Commission's rules. See NPRM ¶ 46. ATSI supports this proposal for formal complaints in general and Section 260 Complaints. The Commission must be cognizant of the importance of time delays in the entire process of resolving disputes between requesting entities and network owners. For telemessagers, a delay in access to the network mean a loss of business, and the loss of business begins immediately at the time a request has been denied or delayed. For network owners, delay is a strategy used in the past to wear down telemessagers' ability to negotiate favorable, pro-competitive terms. Just as the Commission recognized that network owners have incentives to discriminate in favor of their own services or those of their affiliates, the Commission must recognize that the same incentives are at work in delaying the

resolution of disputes and the requesters access to the network.⁵

NPRM ¶¶ 57 -59, Status Conferences.

The Commission proposes to require an initial status conference for all formal complaint proceedings 10 business days after the defendant files its answer to the complaint. See NPRM ¶ 58. The Commission further proposes to require, within 24 hours after a status conference, that the parties in attendance submit a joint proposed order memorializing the oral rulings made during the conference to the Commission. See NPRM ¶ 59. ATSI agrees with the use of status conferences as a way to narrow issues and identify documentation required by the Commission to resolved to the dispute raised in the complaint, and ATSI supports the submission of a joint proposed order. Because a Section 260 Complaint proceeding will require application of certain specialized rules, the status conference might be used to determine all applicable rules and deadlines for a given proceeding.

⁵ See, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 NPRM, CC Docket No. 96-149, FCC 96-308 (released July 18, 1996), paragraphs 8 and 65.

NPRM ¶¶ 60 - 62, Cease, Cease-and-Desist Orders and Other Forms of Interim Relief.

The Commission notes that Section 260 requires the Commission to issue within 60 days of filing upon an appropriate showing of a violation that resulted in material financial harm an order directing the local exchange carrier to cease engaging in such violations pending a final determination by the Commission. See NPRM ¶ 62.

In its comments to the Section 260 NPRM, ATSI argued that the Commission should refrain from developing costly or complex evidentiary standards and agreed that the Commission should decide the materiality of the harm on a case-by-case basis. Nevertheless, all cases involving denial of access of the incumbent's network or delay in responding to request for access by a telemessenger will result in material financial harm. Because telemessengers will make requests to network owners in order to process orders of their customers, a denial or delay on the part of the network owner in providing access to the network, either through interconnection, collocation or utilization of specific network functions and features, always represent material financial harm. Furthermore, material financial harm need not be demonstrated by actual dollars lost. Many instances of the harm realized by telemessengers as ESPs will be in lost opportunities resulting from prolonged negotiations for network access or delayed access to CPNI.

Recognizing the intended distinction between the Commission's formal complaint procedures and those specifically tailored to Section 260 Complaints, ATSI has argued that for those complainants who fail to show material financial harm, recourse should always be available through the Commission's formal complaint procedures. Furthermore, remedies should be available through ADR mechanisms. ATSI has acknowledged the advantages in using ADR mechanisms where such use would achieve a timely and less costly resolution of disputes. Mediation and arbitration opportunities at the state level should also be available to ESPs. These, as well as the Commission's formal complaint procedures and Section 260 Complaint procedures are not mutually exclusive. Any one of these avenues may provide the most appropriate pathway for telemessagers to take in resolving disputes with network owners.

ATSI also commented on the meaning of "appropriate showing". Section 260 requires the Commission, upon an "appropriate showing", to order the incumbent and affiliate where appropriate to cease engaging in the identified activity until the final outcome is determined. In the Section 260 NPRM, the Commission asked what constitutes an appropriate showing in order for the Commission to issue the incumbent an order to cease engaging in the alleged violation. ATSI submitted that an appropriate showing regarding network access issues will be a statement that a request has been made for interconnection, collocation or access to unbundled network elements and that such a request has been denied or a response to such a request has not been

forthcoming or has been unduly prolonged. In all cases, an appropriate showing will have been made where the complainant demonstrates that a request has been made and access has not been achieved. This conforms to the proposal in this NPRM that a complainant certify that efforts to resolve the underlying dispute has been made prior to the filing of a complaint.

In the Section 260 NPRM, ATSI further argued that the Commission should adopt presumptions regarding access to network elements, including the presumption that if any one incumbent is offering a basic service function, then any other will be able to do so.

The Commission should similarly adopt the presumption that if an incumbent is able to offer its own telemessaging service, then a telemessenger should be able to access the network for purposes of providing a similar telemessaging service. This conforms to ATSI's arguments that the Commission must apply an outcome-oriented analysis of the competitive landscape it is required to create and maintain.

NPRM ¶¶ 72 and 73, Replies.

The Commission proposes to prohibit replies to answers unless specifically authorized by the Commission upon a complainant's motion showing that there is good cause to reply affirmative defenses that are supported by factual allegations that are different from any denials also contained in the answer. See NPRM ¶ 72. The Commission states that if replies are so limited, the complainant will have an increased incentive to produce a complaint that reflects the nature and facts of a controversy completely and accurately. See NPRM ¶ 72. ATSI has already pointed out that the complainant will not always have access to or be in the custody of information that is necessary in developing a complete record for the resolution of a dispute. The Commission must anticipate that complainants, therefore, must be given the opportunity to respond to answers that contain information not previously available to the complainant.

ATSI acknowledges the Commission's efforts to streamline its formal complaint procedures; however, ATSI objects to the use of the proposals in this NPRM as a way of fully satisfying the requirements for implementing Section 260 Complaints.

Respectfully submitted,

ASSOCIATION OF TELEMESSAGING
SERVICES INTERNATIONAL (ATSI)

By: 

Frank Moore
Smith, Bucklin & Associates, Inc.
Government Affairs Division
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5100

Its Regulatory Counsel

Herta Tucker
Executive Vice President
Association of Telemessaging Services International
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 429-5151